Supreme Court, U.S.
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No. 98-1327

In The
Supreme Court Of The United States
October Term, 1998

SUSAN OYGARD and NORVALD OYGARD,
Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOAN LEWIS, JOHN ELSESSER, RICHARD ASHLEY and ALAN KOEPKE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S, ALAN KOEPKE'S, BRIEF IN OPPOSITION

Counsel of Record:
DUNCAN J. FORSYTH, ESQ.
JOHN B. FARLEY, ESQ.
HALLORAN & SAGE LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103
Tel. (860) 522-6103
Fax (860) 548-0006

Attorneys for the Respondent:
Alan Koepke

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

I Nature of Case and Proceedings 1

II Statement of Facts 2

REASONS FOR DENYING WRIT 5

I Plaintiffs Seek to Involve this Court in the Adjudication of State Law Claims and the Interpretation of State Rules and Statutes Relating to Procedural Matters 5

II Plaintiffs Now Raise Claims Not Raised in Their Complaint or Summary Judgment Motion 5

III State Procedural Rules Do Not Equate to Federal Property Rights 6

IV The Plaintiffs Alleged Loss is Far Too Speculative to Provide Them Standing to Assert a RICO Claim 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Blum v. Lisbon Leasing Corp., 173 Conn. 175, 377 A.2d 280 (1977) 7

Cummings v. Tripp, 204 Conn. 67, 527 A.2d 230 (1987) 7

Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) 6

Olim v. Wakinekona, 461 U.S. 238, 103 S. Ct. 1741, 75 L.Ed 2d 813 (1983) 6

Oscar v. University Students Co-Operative Association, 965 F.2d 783 (9th Cir. 1992) cert. denied 506 U.S. 1020, (1992) 8

West Farms Associates v. State Traffic Commission, 951 F.2d 469 (2d Cir. 1991), cert denied, 503 U.S. 985 (1992) 6

United States Code:

18 U.S.C. § 1962 1

18 U.S.C. § 1964(c) 6

42 U.S.C. § 1983 1,3

Connecticut General Statutes:

§ 8-7 5,6

§ 8-8 5,6

Other Authorities:

Conn. Rules of Appellate Procedure § 4046 6

STATEMENT OF THE CASE

I. Nature of Case and Proceedings

This case arises out of a decision by the zoning enforcement officer for the defendant Town of Coventry ("Town") in 1986 to issue a zoning permit to defendant Alan Koepke ("Koepke") for construction of a radio communications tower across the street from undeveloped property owned by the plaintiffs Susan Oygard and Norvald Oygard ("Oygards"). Following issuance of the permit, Koepke constructed the tower. The enforcement officer's decision was then reversed by the Zoning Board of Appeals ("Board"). However, eight years of appeals in Connecticut courts by Koepke and the Oygards established that the Board did not provide the requisite statutory notice necessary to render its original decision. The matter was ultimately remanded back to the Board for a new hearing in 1995. The Board then found that the zoning permit should not have been issued. Koepke appealed this decision, but took the tower down and sold the property in 1996.

The Oygards brought this action in state court seeking relief pursuant to the civil rights act, 42 U.S.C. § 1983, and state law. The case was removed to the federal district court for the District of Connecticut and the Oygards amended their complaint to add a count pursuant to RICO, 18 U.S.C. § 1962, as well as another state law claim. The Town filed a counterclaim for breach of contract.

The Oygards, the Town and Koepke all moved for summary judgment. The District Court (Squatrito, J.) denied the Oygards' motion for summary judgment on their § 1983 and RICO claims, and granted summary judgment to the Town and Koepke dismissing the federal claims. Having dismissed all federal claims, the District Court declined to

exercise jurisdiction over the Oygards' supplemental state law claims. (Ruling, Oygard Appendix p. 14).

The Court of Appeals for the Second Circuit in a Summary Order upheld the District Court stating that the granting of summary judgment for the defendants was appropriate "for substantially the reasons stated in [the district] court's opinion." (Summary Order, Oygard Appendix p. 20). The Appellate Court found however, that while the District Court properly declined to exercise jurisdiction over plaintiffs' state law claims, it should have remanded them back to the state trial court.

II. Statement of Facts

The underlying dispute giving rise to this appeal concerns a zoning matter. Koepke is engaged in the business of radio communications, and provides service to fire and police departments and other municipal entities. In 1986, Koepke was issued a zoning permit by the zoning enforcement officer of the Town for construction of a telecommunications tower on land he owned on North School Road in Coventry, Connecticut. After being issued the permit, Koepke constructed the tower. The Oygards, who own property on North School Road have taken the position that construction and operation of the tower violated the Town's zoning regulations and state law.

This dispute has been litigated in the state and federal courts and before the Board since 1986. The complicated procedural history of litigation surrounding the tower is set forth in the District Court's findings of fact and is necessary to provide the context for the issues raised in this petition.

(Oygard Appendix p. 2-3). The tower was ultimately dismantled on August 6, 1996. (Koepke App. p. 3).[1/]

The Amended Complaint contains four counts, two of which raise federal claims and are in issue in this petition. In the First Count, which alleges a claim under 42 U.S.C. § 1983, plaintiffs argue that the defendants "conspired to violate the zoning laws of the State of Connecticut . . . and the zoning regulations of the Town . . . ." The articulated basis of the supposed conspiracy is that the Town allegedly allowed Koepke to unlawfully build and operate the tower in exchange for free communications services.

Koepke has testified that there was never an agreement between him and the Town whereby he would provide free use of the tower in exchange for no enforcement of zoning laws. (Koepke App. p. 3). In fact, Koepke provided free antenna space to all of the ten municipalities which utilized his four towers in eastern Connecticut. (Koepke App. pp. 2-3, 6-9). The Town paid for all equipment which it used on the tower as well as electric and telephone services related to its use. (Koepke App. p. 4). The Town installed its equipment on the tower only after a state judge ruled in 1989 that the Board had no jurisdiction to overturn Koepke's permit.

In the Fourth Count, plaintiffs allege a violation of RICO. The basis of this claim is that Koepke allegedly

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1/ References to "Koepke App." refer to the respondent's appendix which was filed with the Second Circuit Court of Appeals. Pages 1-4 consisted of an affidavit from Alan Koepke, dated March 31, 1997. Pages 5-9 were from the deposition transcript of Alan Koepke, dated January 27, 1997. Pages 10-28 were from the deposition transcript of Susan Oygard, dated January 15, 1997.

bribed municipal officials by conferring upon them free antenna space in exchange for their decision not to enforce the zoning regulations. Koepke testified that there never was such an agreement, and that he provides free services to all municipalities which desire to utilize his various towers in eastern Connecticut. (Koepke App. pp. 1-3, 6-9). Susan Oygard testified that she had no direct evidence of such an agreement, but it was "implicit" from the Town's receipt of free service. (Koepke App. p. 19). According to the Oygards, the decision by the Town to use the tower "was necessarily a decision not to enforce the zoning regulations of the Town of Coventry and the state statutes . . . ." (Oygard App. pp. 40).

The Oygards own approximately 40 acres of undeveloped land on North School Road, a portion of which is across the street from the tower site. They placed this land in a tax relief program for open space shortly after they purchased it. (Koepke App. pp. 15-16).

The Oygards never listed the property with a real estate agent, never contacted an engineer regarding subdivision, never spoke to an attorney about subdivision, never tried to subdivide the property and never obtained any contract for the sale of any portion of the property. (Koepke App. pp. 13, 18).[2/]

After the tower was constructed, a large home of substantial value was constructed on land directly abutting the tower site. (Koepke App. pp. 22-24).

2/ Plaintiffs only spoke with an appraiser shortly before the damages analysis was filed in the district court in June, 1996. (Koepke App. pp. 13-15).

REASONS FOR DENYING WRIT

I. Plaintiffs Seek to Involve this Court in the Adjudication of State Law Claims and the Interpretation of State Rules and Statutes Relating to Procedural Matters

The plaintiffs claim that the "most striking departure from the accepted and usual course of judicial proceedings is the disposition of the counterclaim by the courts below." (Oygard Petition p. 14). This counterclaim deals with the Oygards' breach of an agreement which they entered into with the Town and is purely a state law claim. The District Court, after ruling on the federal claims, declined to exercise jurisdiction over the remaining state law claims. (Ruling Oygard App. p. 14). Since this is entirely a state law contract claim it does not merit review by this Court.

The plaintiffs also claim to have been deprived of certain property interests allegedly created by Conn. Gen. Stat. §§ 8-7 and 8-8. Notwithstanding the plaintiffs' unique interpretation of state zoning statutes there is no need for this Court to involve itself in the interpretation of the procedural stay provisions of state zoning statutes.

II. Plaintiffs Now Raise Claims Not Raised in Their Complaint or Summary Judgment Motion

The Oygards have also raised the following issues in their Petition: (a) whether alleged racketeering by public officials gives rise to substantive due process claims (Oygard Petition p. 23); and (b) whether a classification scheme was created based on alleged racketeering activity which, in effect, denied them equal protection (Oygard Petition p. 25).

These are issues not raised by the Oygards in either their amended complaint or their summary judgment motion. Thus, such claims cannot be raised for the first time before this Court.

III. State Procedural Rules Do Not Equate to Federal Property Rights

Even if the Oygards were correct in their interpretation of procedural stays such as those set forth in Conn. Gen. Stat. §§ 8-7 and 8-8 and Conn. Rules of Appellate Procedure § 4046 these do not raise to the level of federally protected property interests. See, Olim v. Wakinekona, 461 U.S. 238, 250-51, 103 S. Ct. 1741, 75 L.Ed 2d 813 (1983); Hewitt v. Helms, 459 U.S. 460, 471, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); West Farms Associates v. State Traffic Commission, 951 F.2d 469, 472-73 (2d Cir. 1991), cert denied, 503 U.S. 985 (1992).

IV. The Plaintiffs Alleged Loss is Far Too Speculative to Provide Them Standing to Assert a RICO Claim

The plaintiffs' reckless allegations of conspiratorial and criminal conduct involving Koepke, members of the Coventry Town Council, the Town Manger and the Chief of Police continues in their Petition to this Court. However, these reckless allegations now include the District Court and Court of Appeals, who plaintiffs claim have provided a "blueprint" for the future engagement of such conduct. (Oygard Petition p. 20).

In order to have standing under RICO a person must have sustained an injury "in his business or property by reason of a violation of Section 1962 of this chapter," 18 U.S.C. § 1964(c). The only allegation that plaintiffs have

made is that their property was "devalued" as a result of the alleged racketeering activities. (Amended Complaint, Fourth Count, Oygard App. p. 41). This falls far short of the required allegation that the plaintiffs have suffered a tangible financial loss which was caused by the alleged co-conspirators.

Deposition testimony revealed that plaintiffs never made any effort to subdivide or sell their property at any time after the tower was erected in the summer of 1986. In fact, plaintiffs placed their property into the Connecticut program which provides for tax relief for open space property, shortly after they purchased it in 1979 or 1980. (Koepke App. pp. 15-16). They only spoke with an appraiser shortly before the damages analysis was filed in the District Court in conjunction with this litigation in June, 1996. (Koepke App. pp. 15-18). This occurred approximately ten years after the tower was constructed, and only about three months before Koepke tore it down [3/]

Both the amended complaint and deposition testimony established that the plaintiffs have not alleged or shown that they attempted to sell their property or that the perceived devaluation injured them in any way.[4/]

3/ The plaintiffs always possessed the right to institute an injunction action to seek removal of the tower but elected not to. See, Cummings v. Tripp, 204 Conn. 67, 75, 527 A.2d 230, 241 (1987); Blum v. Lisbon Leasing Corp., 173 Conn. 175, 180, 377 A.2d 280, 282 (1977).

4/ After the tower was constructed, a large home of substantial value (perhaps $500,000) was constructed on land directly abutting the tower site. (Koepke App. pp. 19-21).

"Devaluation" of property only becomes a concrete injury when property offered is for sale, subdivided or refinanced - none of which happened in this case. Thus, plaintiffs have failed to allege or show the requisite concrete financial loss to confer standing under RICO. The lack of an allegation or evidence that plaintiffs suffered any actual loss has been and continues to be fatal to their RICO claim. The District Court relied on an analogous case, Oscar v. University Students Co-Operative Association, 965 F.2d 783 (9th Cir. 1992) cert. denied 506 U.S. 1020, (1992) and the Second Circuit agreed with this reasoning. Plaintiffs have pointed to no cases which support their position on this issue.

CONCLUSION

The Respondent, Alan Koepke, respectfully submits that the plaintiffs have failed to demonstrate a basis for the Court to exercise its judicial discretion to grant the Petition for Writ of Certiorari. The Second Circuit Court of Appeals properly applied the law and its decision in no way conflicts with applicable decisions of this Court or any other Court of Appeals.

The Respondent, Alan Koepke, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted

By _____

Duncan J. Forsyth
John B. Farley
Counsel of Record of
HALLORAN & SAGE LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
Tel No. (860) 522-6103
Fax No. (860) 548-0006

Attorneys for the Respondent
Alan Koepke

March, 1999